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VIA FEDERAL EXPRESS

March 29, 1996

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Hon. William F. Caton
Acting Secretary
Office of the Secretary
Federal Communications Commission
1919 M. Street, N. W.
Washington, DC 20554

Re: In the Matter of
Implementation of Section 302 of
the Telecommunications Act of 1996

Open Video Systems

CS Docket No. 96-46

Dear Mr. Caton:

Enclosed please find an original and 10 copies of the comments of the Staff of the New Jersey Office of Cable Television for filing in the above matter. We have included copies for each of the Commissioners.

Kindly place the Office of Cable Television on the service list for this docket.

Please return one copy marked "Filed" in the enclosed addressed, stamped envelope.

Thank you for your consideration.

Very truly yours,

Celeste M. Fasone
Director

RBW/et

Enclosures

c Mr. Larry Walke
Cable Services Bureau

International/Transcription Services Inc.

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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In the Matter of)

Implementation of Section 302 of)
the Telecommunications Act of 1996)

Open Video Systems)

CS Docket No. 96-46

Comments on Notice of Proposed Rulemaking
by the State of New Jersey
Board of Public Utilities'
Office of Cable Television

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The staff of the State of New Jersey, Office of Cable Television (hereinafter "OCTV") of the Board of Public Utilities ("Board"), respectfully submits the following comments to the Notice of Proposed Rulemaking ("NPRM") released by the Federal Communications Commission (hereinafter "Commission") on March 11, 1996. The Board has regulatory authority over telephone utilities in the State of New Jersey pursuant to N.J.S.A. 48:2-13 et seq., and authority over cable television operations pursuant to N.J.S.A. 48:5A-1 et seq. The Board is also the franchising authority for New Jersey cable television systems. Through its Office of Cable Television, the Board has extensive experience with cable systems operating in both competitive and non-competitive environments.

In New Jersey, head-to-head competition is a reality in five municipalities which are currently served by two cable operators. Additionally, another of the state's

municipalities, Dover Township, is the location of the first active video dialtone system in the nation that is offering very real competition to an incumbent cable operator for subscribers.

In these comments the OCTV will address the issues in the NPRM, which it believes are pertinent to New Jersey consumers and best reflect the rapidly evolving telecommunications environment in the state.

AN INCUMBENT CABLE OPERATOR SHOULD NOT BE PERMITTED TO FUNCTION AS AN OPEN VIDEO SYSTEM OPERATOR UNTIL IT FACES REAL COMPETITION.

At paragraph 64 of the NPRM, the Commission asks for comment on whether Section 653 (a)(1) permits cable operators and others to become open video system operators, or whether cable companies may only be authorized to provide video programming on open video systems operated by other entities. This is an important issue because different interpretations of the language referenced by the Commission at paragraph 64 could result in very different competitive environments. Even so, there is no explicit reference in the Telecommunications Act of 1996 ("96 Act") to the role of cable operators as potential operators of open video systems. The OCTV therefore believes that Congress, had it intended to do so, would have given clearer direction with regard to the cable industries' role as open video system operators than that provided in the second sentence of Section 653 (a)(1).

It is also important to note that Part V of the '96 Act is entitled "Video Programming Services Provided by Telephone Companies" and that Part V clearly sets forth the standards under which telephone companies may operate video systems to provide video programming. However, Part V does not in any way suggest that it also applies to video programming provided by cable companies as open video system operators. Moreover, Section 651 (a)(4) provides that common carriers may operate video systems if in compliance with Section 653. Surely, had Congress intended to allow non-common carriers such as cable companies to become open video system operators it would have so provided in a less obscure fashion than that provided by the second sentence of Section 653 (a)(1). Therefore, a more logical reading of Section 653 (a)(1) would be that local exchange carriers may operate open video systems so long as they comply with Section 653, and that cable operators may provide video programming over open video systems operated by certified common carriers.

It should also be noted that there is nothing in the Joint Explanatory Statement of the Committee of Conference on the '96 Act which would suggest that open video systems may be operated by cable companies. In this regard, the conference report states in its discussion of new Section 651, that the Section "specifically addresses the regulatory treatment of video programming services provided by telephone companies." Joint Explanatory Statement of the Committee of Conference, at 56. In addition, the conferees stated:

[t]he conference agreement adds a new section 653 to the Communications Act. The Conferees recognize that telephone companies need to be able to choose from among multiple video entry options to encourage entry, and so systems under this section are allowed to tailor services to meet the unique competitive and consumer needs of individual markets.

[Joint Explanatory Statement of the Committee of Conference at 61.]

As is clear from the above discussion, Sections 651 and 653 are not about cable companies as open video system operators but rather, about telephone companies' options with regard to entry into the video market.

The Commission also states in paragraph 64 that there may be "significant benefits" if the '96 Act is interpreted to mean that cable operators are now permitted to become open video system operators. Thus, the Commission appears to believe that there would be benefits such as the promotion of competitive parity and the potential for the development of outlets for unaffiliated video programming providers, and that this would result in the furtherance of the overall statutory goal of enhancing competition and maximizing consumer choice. The OCTV has reviewed this problem and believes that in fact the very opposite is true. Thus, as noted by the Commission at paragraph 6 of the NPRM, the conferees have stated:

[t]here are several reasons for streamlining the regulatory obligations of such systems. First, the

conferees hope that this approach will encourage common carriers to deploy open video systems and introduce vigorous competition in entertainment and information markets. Second, the conferees recognize that common carriers that deploy open systems will be "new" entrants in established markets and deserve lighter regulatory burdens to level the playing field. Third, the development of competition and the operation of market forces mean that government oversight and regulation can and should be reduced.

[Joint Explanatory Statement of the Committee of Conference at 62.]

Therefore, it appears from the language of the conference report that there was a recognition by Congress that common carriers in the open video market are new entrants and that the treatment afforded such systems under Section 653 will serve to "level the playing field" to make entry into the video market more attractive for entities that would otherwise have difficulty competing with cable operators. The OCTV therefore concludes that there was never an intent, as suggested by the Commission at paragraph 64 of the NPRM, to increase parity by allowing cable operators to easily enter the open video system market as operators, and that any other interpretation would have the effect of increasing the advantage cable operators already have, an advantage which Congress has sought to rectify.

In addition to the above legal constraints, it appears that there are good public policy reasons why cable operators should not be allowed to become open video system operators without first becoming common carriers. For example, if an incumbent cable operator were allowed to

operate an open video system in its own service area at the present time, before actual competition has developed, the likely result would be that cable operators would simply reclassify their existing systems as "open video systems", thus eluding most of their current regulatory burdens. If this were to occur, competitive forces would most likely not materialize for the same reason they have not materialized to date. In this regard, potential competitors may view the investment necessary to start an open video system as a risky venture with little chance of success, because it would be highly unlikely to attract a sizeable portion of an incumbent cable operator's subscriber base to its new startup service. Therefore, the OCTV believes that absent the advantage presented to a competitor vis-a-vis the open video system, a new entrant will not see head-to-head competition as likely to produce a return on its investment.

Additionally, in an environment where an open video system operator chooses to compete with an incumbent cable operator, the open video system operator is likely to duplicate not only the required public, educational and governmental ("PEG") access channels, but to also match other services provided by the incumbent. However, if an incumbent cable operator were allowed to immediately become an open video system operator, it would no longer be obligated to meet certain negotiated aspects of the original community's established franchise. Therefore, if another open video system operator were to now attempt competition in the same community where the incumbent cable operator is now an open

video system operator (with reduced obligations), the new entrant would only have to meet these reduced obligations to be competitive. For example, in New Jersey cable operators in many instances have agreed to extend their systems to previously unserved areas with low population densities as part of the franchise agreement. If the incumbent cable operator has reclassified itself as an open video system and is therefore no longer subject to this commitment, the new entrant would have no incentive to wire these areas. This result would be one of the many consequences of allowing cable operators to function as open video system operators.

The OCTV also believes that a cable operator that is afforded the opportunity to function as an open video system operator will be far better positioned to immediately attract any alternative video programmers that may be willing to enter a market. This is because the incumbent can offer immediate access in many cases, while a competitor has not yet even built a system. Furthermore the incumbent cable operator, that has historically had fewer restrictions on programming channels on its own system, has had some time to recover its investment by retaining more of its programming revenues. As a result, a cable operator functioning as an open video system operator may be in an advantageous position to offer more competitive rates to alternative programmers by virtue of having previously recovered more of its startup costs, an advantage not necessarily available to a new open video system operator.

The OCTV believes that if the Commission determines, despite the OCTV's belief that the '96 Act does not authorize the operation of open video systems by cable operators, that cable operators should be permitted to function as open video system operators, it should at most only allow cable operators to become certified to operate open video systems outside of their own service areas unless and until they become subject to competition in their own service areas. With regard to the issue of allowing cable operators to function as open video system operators in their own service areas, the OCTV believes that limitations should be imposed which are similar to the restrictions that Congress has imposed on incumbent local exchange carriers ("LECs") wishing to offer in-region interLATA services, where the LEC must certify that it is open to competition. Similarly, at a minimum, the OCTV believes that all cable operators should meet a meaningful competitive standard, before receiving certification as an open video system operator. This could perhaps be accomplished through a similar certification process as that applied to LECs, in order to ensure that actual competition develops.

Additionally, the OCTV is concerned about other impacts on the municipal franchising process that may result from a cable operator's ability to immediately become an open video system operator. These include, but are not limited to, municipal right-of-way agreements, pole licensing agreements, franchise fees, and other franchise commitments (i.e., PEG access channels and equipment upgrade commitments). The OCTV

believes the Commission should closely examine any possible adverse effects on existing agreements and impacts on the ability of state and/or local governments to enforce consumer protection laws which remain a necessity at least until competition arrives. As an example, if a cable operator were afforded the opportunity to reclassify itself as an open video system operator, it might be possible for it to avoid rate regulation long before competition arrives.

In conclusion, the OCTV sees no advancement of the public interest by allowing cable operators to function as open video system operators until such time as the competition sought by Congress has had an opportunity to develop. Moreover, as noted above, the '96 Act does not authorize the creation of such systems by cable operators. Therefore, allowing cable operators to function as open video system operators at this time will preclude competition from developing, and is therefore not only unlikely to advance the public interest, but is contrary to it. The OCTV also believes that there must be a meaningful competition standard such as the competition standard originally defined in the Cable Television Consumer Protection and Competition Act of 1992, where a competitor must pass 50% of the homes in a given area, and must have signed up 15% of the total available homes in that area to its service. Only in this way can the Commission advance the public interest as it relates to this rulemaking by offering fair and balanced incentives to foster the development of meaningful competition.

OPEN VIDEO SYSTEM OPERATORS SHOULD BE REQUIRED TO
DUPLICATE PEG ACCESS OBLIGATIONS OF INCUMBENT CABLE OPERATORS
BY INTERCONNECTION, COST SHARING AND PROVISION OF PEG
CHANNELS TO ALL SUBSCRIBERS.

With respect to the Commission's request for comments on how open video system operators should be required to meet PEG access requirements provided for in the '96 Act, the OCTV offers the following background information for illustrative purposes.

In New Jersey, franchising is a bifurcated process with the Board of Public Utilities taking an oversight role. PEG access franchise requirements are ascertained by municipal review of the past performance of the cable operator and determination of the future cable related needs of the municipality. The municipality passes a consent ordinance which contains the provisions which have been agreed upon by the parties. Until the Board acts upon the municipal consent ordinance adopted by the municipality, none of the terms are effective. The Board's role is to review and approve any agreement reached by the parties. The Board, as franchising authority, also has the power to enforce these agreements. The Board, however, has not adopted any minimum PEG access regulations which a cable operator must follow. Therefore, the de facto PEG access franchise regulations are the provisions contained in the agreements between the municipalities and the cable operators which must be approved by the Board.

Most cable operators with systems in New Jersey service more than one franchise area. Since each municipality is individually franchised, cable operators can serve 30 or more franchised communities. As the municipality determines the PEG requirements, it is up to the cable operator to reconcile these requirements with the rest of its system. Fiber optic technology has made it possible for a cable operator to tailor its system for a particular municipality in a manner which allows only that municipality to receive the PEG access channel in question.

Some municipalities in New Jersey have negotiated for fully equipped studios as well as two or three dedicated PEG access channels. Other municipalities have contented themselves to require that the cable operator provide PEG access time on a local origination channel or provide coverage of community events. Other cable operators offer regional PEG access channels. Regional access channels have been utilized where several municipalities deem that one shared access channel meets their needs. The channel is cablecast out of a central origination point, which could include a studio as part of the franchise requirement, and all of the municipalities participate in the programming and control.

The OCTV believes that it would be beneficial to require that an open video system operator interconnect with the cable operator in order to provide comparable PEG access requirements as the cable operator. This achieves the '96

Act's requirement that the Commission should impose PEG obligations on the open video system operator that are no greater or lesser than those imposed on cable operators. In this regard, technology exists to allow interconnection with the cable operator with live real time programming capability.

Situations where the open video system operator is not able to provide live programming should not set aside its obligation to provide PEG access commitments required by the '96 Act. If the open video system operator is not able to provide live real time programming capability it should provide for taped programming to be shown by the cable operator on the system. The OCTV further believes that in situations where the cable operator provides time on its local origination channel for PEG access programming, only the pre-designated PEG access time should be programmed on the open video system. If the entire local origination channel is programmed, this would allow the cable operator to use the open video system for advertising and have the open video system operator absorb costs in doing so.

With respect to the Commission's request for comment on whether the open video system operator should share costs with the cable operator for the PEG provisions, the OCTV believes that the open video system operator should be required to share costs with the cable operator in its PEG access requirements. These costs could include, but not be limited to, capital contributions for support of access,

training costs, videotaping costs, editing costs, or any other costs that the cable operator is expected to absorb in the provision of PEG access franchise requirements. However, this arrangement should be established on a prospective basis. That is, if the open video system operator enters the market midway through a franchise, it should not be required to absorb costs already expended by the cable operator to meet PEG access franchise commitments.

The OCTV believes that the above described cost sharing arrangement may save both parties capital expenditures. That is, the cable operator would benefit because it would share costs relating to the fulfillment of its franchise requirements on a going forward basis, while the open video system operator would not have to duplicate the cable operator's prior PEG access franchise commitment costs. Further, the OCTV believes that this cost sharing mechanism would not be unduly burdensome considering the reduced regulatory burden of open video system operators.

With respect to the Commission's request for comment on whether the provisions should be subject to change if the cable operator and franchise authority negotiate new PEG obligations, the OCTV believes that the above referenced arrangement should address these concerns as the interconnect will be in place and will be viable without much additional expenditures to the open video system operator. Additionally, any costs would be absorbed by both the cable

operator and the open video system operator on a going forward basis.

However, the OCTV believes that a periodic revisiting by either the Commission or some local authority will be necessary in order to determine how the arrangements between the cable operators and the open video system operators are working and whether either party is receiving an unfair advantage because of the arrangement. By way of example, this could be accomplished by instituting renewable agreements for carriage between the cable operator and the open video system operator. Another method would be for the Commission to establish a pre-set review period.

With respect to the Commission's request for comment on open video system carriage of PEG access channels, the OCTV believes that the PEG access channels should be provided by an open video system operator to all subscribers on its system, whether or not the individual subscriber in fact requests PEG access channels. However, should the Commission determine that a "basic service package" is not required, the OCTV recommends that the Commission promulgate rules which would require that the cost of the PEG access channels be made part of the subscriber line-charge paid by all subscribers. However, the OCTV also believes that any PEG access channel carriage requirement should not be counted

towards the open video system operator's one-third "selected" program services.

CONCLUSION

For the foregoing reasons, we urge that the Commission accept these comments and act accordingly.

Respectfully Submitted,

Celeste M. Fasone

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Director